

LESLIE E. DEVANEY
ANITA M. NOONE
LESLIE J. GIRARD
SUSAN M. HEATH
GAEL B. STRACK
ASSISTANT CITY ATTORNEYS

OFFICE OF
THE CITY ATTORNEY
CITY OF SAN DIEGO

Casey Gwinn
CITY ATTORNEY

CIVIL DIVISION
1200 THIRD AVENUE, SUITE 1200
SAN DIEGO, CALIFORNIA 92101-4184
TELEPHONE (619) 533-5800
FAX (619) 533-5847

MEMORANDUM OF LAW

DATE: January 6, 1997
NAME: Penelope Culbreth-Graft, DPA, Assistant City Manager
FROM: Sharon A. Marshall, Deputy City Attorney
SUBJECT: Personnel Backgrounds and Gang Affiliation

QUESTION PRESENTED

May the San Diego Police Department (SDPD) provide information concerning gang affiliation from its gang intelligence data base to the City's Personnel Department for purposes of applicant background checks?

SHORT ANSWER

No. Information in the possession of the SDPD that has not led to a criminal conviction may not be disclosed to the City as part of the background checks of applicants for City employment.

BACKGROUND

Currently, the Personnel Department does background checks on applicants for City employment commensurate with the job being sought. Recent news events have raised questions regarding whether the processes employed provides sufficient information for critical employment decisions. As a result, the City is seeking to expand its access to personal information that may be helpful in determining an applicant's suitability for certain City positions. One proposed avenue for information contemplates access to gang affiliation files maintained by the SDPD. The SDPD already maintains files of known gang members and uses the files for specific purposes. This procedure has been approved by the legislature. It is codified in the California Penal Code. The City Manager is interested in incorporating data from these police files into the background check process applicants for City employment currently undergo. You asked whether this information may be released to the Personnel Department for this purpose.

ANALYSIS

Statutory Analysis

The dissemination of arrest records and other criminal history for employment purposes is primarily governed by California Labor Code section 432.7. Labor Code section 432.7(g)(1) states in pertinent part:

No peace officer or employee of a law enforcement agency with access to criminal offender record information maintained by a local law enforcement criminal justice agency shall knowingly disclose, with the intent to affect a person's employment, any information contained therein pertaining to an arrest or detention or proceeding which did not result in a conviction

The provisions of Labor Code section 432.7, although broad, do not apply to individuals seeking positions as peace officers or other law enforcement positions. Cal. Labor Code § 432.7(b). Such positions are exempted from the protections of the statute, because the specialized nature of law enforcement positions requires greater knowledge of an applicant's physical and psychological make-up.

With respect to the kind of criminal information law enforcement agencies can disclose to public employers, Labor Code section 432.7 sets forth specific limitations. Unless the peace officer exemption applies, the SDPD cannot disclose criminal information about an applicant involving arrests, detentions or proceedings not resulting in a conviction.¹

While the statute covers arrest records, the scope of information contained in gang intelligence files goes beyond mere arrest records. The gang files may contain information elicited during a consensual encounter where no arrest was made. Incursions into non-criminal activity of individuals also involves constitutionally protected interests. An individual who has been arrested or detained by the police, but not convicted, has not been found guilty of a crime. Since this type of information may have a severe negative impact on an individual's employment opportunities, the provisions of Labor Code section 432.7 prevent employers from considering such non-conviction criminal information in the application process.

The Public Records Act, California Government Code sections 6250 through 6268, specifically exempts from disclosure "records of complaints to, or investigations conducted by, or records of intelligence or security procedures of . . . any state or local agency." Cal. Gov't Code

¹The Legislature has made specific exceptions to this rule including exceptions for employers at a health facility. See California Labor Code section 432.7(f).

§ 6254(f). There are certain exceptions to this rule, but both the courts and the legislature have been hesitant to expand the parameters surrounding the release of criminal history information. The exceptions generally concern the right of the press to certain information regarding arrests.

The courts have explained that the exemption for release of contemporaneous arrest information reflects the traditional common law concern in democratic societies with the prevention of secret arrests. Government Code section 6254(f)(1) provides that "local law enforcement agencies shall make public . . . [t]he full name, current address, and occupation of every individual arrested by the agency, the individual's physical description including date of birth, color of eyes and hair, sex, height and weight, the time and date of arrest, the time and date of booking, the location of the arrest, the factual circumstances surrounding the arrest . . ." and other details of the arrest.

The courts have interpreted this exception to the general non-disclosure rule to refer to only contemporaneous information. In fact, in Kusar v. County of Los Angeles, 18 Cal. App. 4th 588 (1993) the court specifically rejected a broad interpretation of the statute. The court said "[b]ased on the legislative purpose and intent which we glean from the legislative history, we conclude that the records to be disclosed under section 6254 subdivision (f)(1) and (2), are limited to current information and records of the matters described in the statute and which pertain to contemporaneous police activity." Id. at 610.

The guidance from the courts is further indication that release of collected and stored information regarding an individual's arrest activity, especially that which does not result in a criminal conviction, is not permitted by law. As previously noted, gang affiliation history may not even rise to the level of including known arrest activity, but may reflect only associations. Such information is well beyond the parameters of information that the courts would consider appropriate for release for purposes other than those specifically enumerated in the statutes dealing with the control and containment of gang activity.

Constitutional Rights

Much of the information in the police intelligence files is gathered through detentions or consensual encounters resulting in neither arrests nor convictions. Information linking an individual to gang membership, or appearance in the gang intelligence file, may be based on nothing more significant than a statement of acknowledgment that the individual has been seen in the company of a known gang member. No implication of criminal activity may be extrapolated from mere association. In developing the statutory provisions addressing the serious nature of, and problems associated with, gang issues, the legislature took pains to note: "It is not the intention of this chapter to interfere with the exercise of the constitutionally protected rights of freedom of expression and association." Cal. Penal Code § 186.21.

In addition to issues of freedom of association, Article I, Section 1 of the California Constitution, adopted as a constitutional amendment in 1972, specifically carves out a right to privacy protected as an inalienable right. White v. Davis, Cal. 3d 757, 773 (1975). In White, the California Supreme Court listed the primary "mischiefs" the privacy amendment was designed to hold in check. One of the "mischiefs" discussed by the Court was "the improper use of information properly obtained for a specific purpose." Id. at 775. The court stated it would be improper for a government agency to disclose properly obtained information to a third party to use for another purpose. Information collected for purposed of combating gang violence, but subsequently used for employment purposes, would be just such an improper use.

Relying on the principles laid out in White, a California Court of Appeal addressed the issue of whether a law enforcement agency could supply non-conviction criminal arrest records and other non-conviction criminal data to public employers to be used in the applicant screening process. Central Valley Ch. 7th Step Foundation, Inc. v. Younger, 214 Cal. App. 3d 145 (1989). The court held that while law enforcement agencies could maintain arrest records and other non-conviction data for legitimate law enforcement purposes, they could not disseminate non-conviction data to non-exempt employers. To do so, would violate the right to privacy guaranteed by the California Constitution. Id. at 159-161.

The court in Younger noted that the constitutional right to privacy is not absolute. The court explained that an incursion into an individual's privacy may be justified by a compelling governmental interest. The disclosure of non-conviction data to non-exempt employers, however, was not found to serve a compelling interest. The court stated, "certainly it is not obvious why non-exempt agencies and licensing entities require information that apparently does not pertain to a criminal conviction." Id. at 163. The court specifically noted its concern that the misuse of arrest records and other incomplete criminal records would serve as a basis for denying employment to a former arrestee or detainee.

Since the Younger decision was handed down, the California Supreme Court has clarified the right to privacy cause of action. This cause of action was at issue in Hill v. National Collegiate Athletic Ass'n., 7 Cal. 4th 1 (1994). In Hill, the court held the "compelling state interest" standard in privacy cases should only be used when fundamental interests are involved such as "freedom from involuntary sterilization or the freedom to pursue consensual familial relationships." Id. at 34. In cases where the privacy interest involved is less important, a general balancing test should be used. This less stringent balancing test requires the court to balance the individual's privacy interest against the countervailing legitimate and important governmental interest that lies behind the intrusive action. However, even if the government puts forth a countervailing interest, the individual may rebut such a showing by demonstrating that there are reasonable and effective alternatives to the intrusive governmental conduct which would have a lesser impact on the individual's privacy interests. Id. at 40.

As discussed in Hill, if it has been determined that a particular government action would violate an individual or class of individual's right to privacy, a court must undertake a balancing test to weigh the conflicting interests. The City has a very important interest in insuring that its employees are not involved in criminal activity. This is especially true when the employment positions involve the supervision of children or involve positions of trust. The California legislature has found "the State of California is in a state of crisis" which has been caused by the multitude of crimes committed by violent street gangs and that the criminal activities committed by gangs "present a clear and present danger to public order and safety and are not constitutionally protected." Cal. Penal Code § 186.21. The legislature has also found that unsupervised young people are especially vulnerable to gang activity. Cal. Penal Code § 13826.11. Thus, legislative findings bolster the argument that the City has a strong and important interest in using gang-related data from the police files to screen applicants for City employment, especially in positions which require the supervision of children.

These important governmental interests must be weighed against the privacy interests applicants have in preventing the disclosure of non-conviction criminal information. The Younger court stressed the problems surrounding the disclosure of non-conviction information for employment purposes. The Hill court severely limited the types of governmental interests to be considered compelling enough for the State to abrogate an individual's constitutional rights.

Based on the decisions in Younger and Hill, the City's proposed use of the police databases to access information relating to gang affiliation for employee screening purposes would violate the right to privacy provision of the California Constitution. The Younger court makes it clear law enforcement agencies would be in violation of the California Constitution if they disclose non-conviction criminal information to public employers. Here, gang information may not even rise to the level of criminal activity, it may be mere notice of association with known gang members. The information in the SDPD files regarding gang affiliation contains a significant amount of non-conviction information. Such a disclosure would be considered a misuse of information obtained for a legitimate purpose as explained in White.

Other Privacy Considerations

Finally, many individuals affiliated with gangs are juveniles. Juvenile records are given additional protection; the legislature has provided juvenile arrest records be sealed. This is done to prevent an individual who made mistakes as a juvenile from being continually punished for those mistakes as an adult. T.N.G. v. Superior Court, 4 Cal. 3d 767, 774-778 (1971).

CONCLUSION

Based on a review of the California Labor Code and the California Constitution's Right to Privacy, the SDPD is precluded from providing gang-related information from its data base to the City for employment purposes. Although the City may have an important governmental interest in obtaining such information, a court would most likely determine that the governmental interest does not outweigh the individual privacy interests involved. Also, Labor Code section 437.2 specifically forbids the dissemination of non-conviction criminal information for employment purposes. I have attached a copy of a previous memorandum of law which provides an in-depth analysis of information accessible for employment purposes.

CASEY GWINN, City Attorney

By

Sharon A. Marshall
Deputy City Attorney

SAM:jrl:(x043.2)

Attachment

cc Jack McGrory, City Manager
Rich Snapper, Personnel Director
Keith Enerson, Assistant Chief, SDPD

ML-97-1